

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

**CASE NO. 02-025**

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**IN THE MATTER OF,**

**D.A.,**

**Youth in Need of Care.**

---

**ON APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL  
DISTRICT COURT OF THE STATE OF MONTANA  
IN AND FOR THE COUNTY OF SILVER BOW**

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**APPELLANT'S OPENING BRIEF**

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1 Statement of the Issue for Review.

2 Whether findings of fact which partially restate statutory language are  
3 sufficiently comprehensive and detailed to satisfy requirements set forth in  
4 *Wolfe v. Webb*, 251 Mont. 217, 228-29, 824 P.2d 240, \*\* (1992) and §§ 41-  
5 3-437(7), 41-3-442 M.C.A. (2001).

6  
7 Statement of the Case.

8 Nature of the Case.

9 The Montana Child and Family Services Division of the Department  
10 of Public Health and Human Services (hereinafter, Department) brought this  
11 action in Silver Bow County District Court for temporary legal custody of  
12 the infant D.A. After a hearing on November 8<sup>th</sup>, 2001, Honorable John W.  
13 Whelan entered an Order for Temporary Legal Custody on November 13<sup>th</sup>,  
14 2001. K.G., biological mother of D.A. appeals on the ground that the  
15 findings of fact in the order and are not sufficiently comprehensive and  
16 detailed.

17  
18 History of the Case.

19 On September 18<sup>th</sup>, 2001, Silver Bow County Justice of the Peace,  
20 Hon. M.A. Bartholomew, issued a Temporary Order of Protection to restrain  
21 S.S., K.G.'s live-in boyfriend from contact with K.G. or with D.A., her infant  
22 daughter. After a May 31<sup>st</sup> hearing, Judge Bartholomew extended the  
23 Justice Court Order of Protection through August 31<sup>st</sup>, 2001. Order of  
24 Protection, p. 3.

25 On May 21<sup>st</sup>, 2001, the Department filed a Petition for Temporary  
26 Investigative Authority and Order to Show Cause in Silver Bow County

1 District Court. Judge Krueger issued an Order to Show Cause setting a  
2 hearing on the petition for June 7<sup>th</sup>, 2001 and granted emergency protective  
3 powers to the Department. Butte attorney Timothy Dick was appointed  
4 Guardian ad Litem for D.A. Order to Show Cause, p. 3. The Department's  
5 supporting affidavit reported the following:

6       On May 17<sup>th</sup>, 2001 Butte Silver Bow Law  
7       Enforcement requested that the Department of Child and  
8       Family Services investigate the case of a 10 month old  
9       infant, [D.A.], who was in the care of her mother's  
10      boyfriend, [S.S.] This individual was being arrested for  
11      family domestic abuse. The infant's mother, [K.G.], was  
12      in the process of completing a restraining order against  
13      the boyfriend, and therefore was unable to care for the  
14      child.

15       [D.A.] had bruises of varying ages on multiple  
16      areas of her body. She was taken to the emergency room  
17      and given a thorough examination. A follow-up  
18      appointment the next day suggested that a CAT scan  
19      should be done. The results of these tests resulted in  
20      [D.A.'s] being admitted to the hospital for observation of  
21      her injuries.

22       At this time the Department is trying to determine  
23      who caused the injuries to [D.A.].

24       ...

25       The mother stated "She did not know how the  
26      injuries occurred." The mother also stated "She found  
27      the bruises on the child on May 10<sup>th</sup>, 200," (sic) and she  
28      confronted the boyfriend, [S.S.], because the baby has  
29      been in his care while she works. He denied causing the  
30      injuries and then became physically abusive to her.

31       Affidavit of Social Worker for Temporary Investigative Authority,  
32      May 21<sup>st</sup>, 2001, p. 2-3.

33       On June 8<sup>th</sup>, 2001, D.A.'s biological father, B.A., stipulated with the  
34      Department to a 90 day period of temporary investigative authority.

35       On June 6<sup>th</sup>, 2001, K.G. received a continuance of the June 7<sup>th</sup>, 2001

1 hearing. On June 19<sup>th</sup>, 2001, K.G. denied that she caused or permitted  
2 physical abuse of her daughter. Response to Petition for Temporary  
3 Investigative Authority and Order to Show Cause. On July 16<sup>th</sup>, 2001, K.G.  
4 and her counsel stipulated with the Department to waive K.G.'s right to  
5 hearing and to a 90 day period temporary investigative authority period, and  
6 an order was accordingly entered.

7 On September 18<sup>th</sup>, 2001, following the expiration of the temporary  
8 investigative authority period, the Department filed a Petition for  
9 Temporary Legal Custody and Protective Services. On October 1<sup>st</sup>, 2001,  
10 K.G. filed a Motion to Strike Petitioner's Affidavit and Proposed Exhibits  
11 from Court Record and Supporting Memorandum (hereinafter, Motion to  
12 Strike). In her Motion to Strike and Reply Memorandum, K.G. raised  
13 procedural objections to evidence offered by the Department to the effect  
14 that (i) there was no allegation K.G. had abused D.A. (ii) that K.G. had  
15 taken reasonable steps to protect D.A. from her abuser S.S. (iii) that K.G.  
16 had confronted S.S. regarding D.A.'s injuries and was herself repeatedly  
17 injured by S.S., and (iv) that the Department did not obtain parenting or  
18 domestic violence evaluations.

19 On October 2<sup>nd</sup>, the Department opposed K.G.'s motion and filed a  
20 Notice of Hearing setting the matter to be heard on October 11<sup>th</sup>. On  
21 October 4<sup>th</sup>, K.G. moved to continue the hearing. On October 5<sup>th</sup>, K.G.  
22 replied in support of her Motion to Strike, and the District Court set the  
23 matter for hearing on November 8<sup>th</sup>.

24 On October 26<sup>th</sup>, the Department moved to continue temporary  
25 investigative authority pending the hearing and that motion was granted.  
26 On November 7<sup>th</sup>, Butte attorney David Vicevich was appointed to represent  
27  
28

1 B.A., D.A.'s natural father. On October 25<sup>th</sup>, November 6<sup>th</sup> and at the  
2 November 8<sup>th</sup> hearing, K.G raised substantively the same points as those  
3 enumerated above. See, e.g., Transcript, pp. 50, line 7 - 52, line 5.

4 On November 8<sup>th</sup>, a hearing was held and testimony was received by  
5 the district court from five witnesses. On November 9<sup>th</sup>, B.A. and his  
6 counsel stipulated with the Department to continue D.A.'s temporary legal  
7 custody by a foster parent for a six month period. On November 13<sup>th</sup>, the  
8 District Court entered the Order for Temporary Legal Custody from which  
9 K.G. appealed.

10  
11 Summary of the Argument.

12 Comprehensive and detailed findings of fact are necessary to  
13 determine whether there is evidence to support a given legal conclusion. A  
14 district court has vast discretion to weigh evidence and consider the  
15 credibility of witnesses when reaching its legal conclusions. Once a  
16 conclusion is reached, the district court can also expect this Court to defer to  
17 its factual judgments.

18 However, the *quid pro quo* for such deference needs to be reasoned  
19 judgment. The legitimacy of the judicial process depends on the ability of  
20 appellate courts, the public and of litigants to review --- though not  
21 necessarily agree with the reasoning of the district court. The findings of  
22 fact here at issue conclusorily restate statutory language. The findings are  
23 incomplete and lack key material factual details. Such findings short circuit  
24 *stare decisis* and threaten public confidence in the District Court.

25 It is a simple matter for a district court to adopt --- verbatim if it  
26 wishes --- comprehensive and detailed findings of fact which are proposed

1 by a prevailing party. There is no reason for this Court to approve  
2 undetailed and incomplete findings of fact which obscure the reasoning of  
3 the district court from review and which do not comply with the  
4 straightforward requirements of *Wolfe v. Webb*, 251 Mont. 217, 228-29, 824  
5 P.2d 240, \*\* (1992) and §§ 41-3-437(7), 41-3-442 M.C.A. (2001).

6  
7 Argument.

8 In order to grant a Petition for Temporary Legal Custody, "a child  
9 must be found to be a youth in need of care under 41-3-437" and there must  
10 be a determination that:

- 11 (a) dismissing the petition would create a  
12 substantial risk of harm to the child or  
13 would be a detriment to the child's physical  
14 or psychological well-being; and  
15 (b) unless there is a finding that reasonable  
16 efforts are not required pursuant to 41-3-  
17 423, reasonable services have been provided  
to the parent or guardian to prevent the  
removal of the child from the home or to  
make it possible for the child to safely  
return home.

18 § 41-3-442 M.C.A. (2001). The burden of proof is a preponderance  
19 of the evidence standard. *Id.* The "child's health and safety" are of  
20 "paramount concern" to the district court. *Id.*

21 In order to adjudicate a child as a youth in need of care under § 41-3-  
22 437, a district court must make written findings:

- 23 (5) The Court shall make written findings on issues,  
24 including but not limited to the following:  
25 (i) which allegations of the petition have been  
26 proved or admitted, if any;



- 1 (ii) whether there is a legal basis for continued  
2 court and department intervention; and  
3 (iii) whether the department has made  
4 reasonable efforts to avoid protective  
placement of the child or to make it possible  
to safely return the child to the child's home.

5 § 41-3-437(7) M.C.A. (2001).

6 Though the practice is not encouraged, a Montana District Court may  
7 adopt verbatim findings of fact proposed by a prevailing party provided that  
8 the findings of fact are "comprehensive and detailed and supported by the  
9 evidence." *Wolfe v. Webb*, 251 Mont. 217, 228-29, 824 P.2d 240, \*\*  
10 (1992); followed in, *Marriage of Boyer*, 261 Mont. 179, 185, 862 P.3d 384,  
11 387 (1993).

12 The *Wolfe* and *Boyer* decisions clarify the requirements set forth in  
13 Rule 52(a), M.R.C.P. *Id.* Identical language in the Federal Rules of Civil  
14 Procedure further clarifies a rationale for the requirements.

15 In bench trials, Fed. R. Civ. P. 52(a) requires a  
16 court to "find the facts specially and state separately its  
17 conclusions of law thereon." One purpose behind Rule  
18 52(a) is to aid the appellate court's understanding of the  
basis of the trial court's decision. *Lumbermen's*  
*Underwriting Alliance v. Can-Car, Inc.*, 645 F.2d 17, 18  
19 (9th Cir. 1980).

20 This purpose is achieved if the district court's findings  
21 are sufficient to indicate the factual basis for its ultimate  
22 conclusions. [citations omitted]. Failure to comply with  
23 Rule 52(a) does not require reversal unless a full  
understanding of the question is not possible without the  
aid of separate findings. *Alpha Distributing Co. v. Jack*  
*Daniel Distillery*, 454 F.2d 442, 453 (9th Cir. 1972).

24 We will affirm the district court if the findings are  
25 sufficiently comprehensive and pertinent to the issues to  
26 provide a basis for the decision, or if there can be no  
genuine dispute about omitted findings. *Magna Weld*  
*Sales Co. v. Magna Alloys & Research Party*, 545 F.2d  
668, 671 (9th Cir. 1976).

*Vance v. American Hawaii Cruises*, 789 F.2d 790, 792 (9<sup>th</sup> Cir. 1984);  
see also, J.A. Bryant, *Propriety and Effect of Trial Court's Adoption of  
Findings Prepared by Prevailing Party*, 54 A.L.R.3d 868 (2001).

Contrary to the controlling statutes and the holding of this Court in *Wolfe*, the November 18<sup>th</sup> Order for Temporary Legal Custody issued by the district court in this matter does not contain findings of fact which are detailed or comprehensive. Order for Temporary Legal Custody, p. 1-2. Instead, the findings restate statutory language from 41-3-442 in a manner which is incomplete and conclusory. *Id.* The specific allegations at issue have not been separately addressed in writing as required by 41-3-437(5)(i). *Id.*

None of the disputed witness testimony is specifically summarized, considered or weighed. *Id.* No exhibits are identified (except the Department's affidavit in support of its petition). *Id.* The District Court has not relied on any specific document or testimony as either a whole or partial basis for its legal conclusions. *Id.* For example, instead of making specific written findings on "whether the department has made reasonable efforts to avoid protective placement of the child or to make it possible to safely return the child to the child's home," Finding of Fact No. 3 indiscriminately references the entire affidavit of the Department. *Id.*

On August 27<sup>th</sup>, October 23<sup>rd</sup>, and November 6<sup>th</sup>, K.G. filed written objections to what she contended were procedural irregularities. See Transcript, p. 50. On October 1<sup>st</sup>, K.G. moved to strike the Department's affidavit. *Id.* K.G. raised issues of concern to her in writing prior to the November 8<sup>th</sup> hearing. The District Court did not address any of these issues in its written findings or legal conclusions.

1 The extent to which the Court even considered any of the factual and  
2 legal questions raised by K.G. is unclear at best. *Id.* pp. 50-52; 78-82. For  
3 example, following presentation of the evidence, the Court addressed K.G.  
4 in open court. *Id.* pp. 78-82.

5 . . . [I]f some new -- a shiny knight came into your  
6 life and you invited that person into your home and he  
7 turns out to be something else, and your child suffers as a  
8 result of it, all of us pay the penalty. And your child at  
9 this age is totally defenseless, other than through you.  
10 You have to defend that child.

11 . . .

12 [I] don't think you had a problem with your child  
13 before this time. Your problem was with other people.  
14 And that's what we're addressing here today, and your  
15 vulnerability to do that same thing again because of the  
16 past three (sic) relationships of somebody who has  
17 abused you. . . .

18 *Id.*

19 These comments suggest that the Court granted the Temporary Legal  
20 Custody Order based on evidence that K.G. would return to an abusive  
21 relationship. However, there are not comprehensive and detailed findings  
22 which would enable a third party to determine how or if there is evidence to  
23 support such a conclusion.


#### 24 Conclusion.

25 The district court should be reversed and the case remanded with  
26 instructions that the district court enter findings of fact and conclusions of  
27 law which are sufficiently comprehensive and detailed to satisfy the  
28 requirements of *Wolfe v. Webb*, 251 Mont. 217, 228-29, 824 P.2d 240, \*\*  
(1992) and §§ 41-3-437(7), 41-3-442 M.C.A. (2001).

If upon further reflection the District Court deems that the evidence in  
the record does not support findings of fact and conclusions of law which

1 will satisfy the requisite legal requirements, then the District Court should  
2 be instructed to consider whether the matter should be dismissed.

3 RESPECTFULLY SUBMITTED this <sup>2</sup>6th day of March, 2002.

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Dated this 6th day of March, 2002.

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